IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 316 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GAJANANAD SOAP INDUSTRIES HANSAPUR - Appellant(s)

Versus

GUJARAT SOAP INDUSTRIES - Defendant(s)

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Appearance :

MR SK PATEL for Appellant(s) : 1,
MR JATIN Y TRIVEDI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 19/09/2005

ORAL JUDGMENT

This Appeal from Order challenges the order passed by the learned Additional Sessions Judge and Presiding Officer, Second Fast Track Court, Mehsana on 25/08/2005, below Exh.5 application, in Regular Civil Suit No.4 of 2005, restraining the defendant (present appellant) and / or

their partners, agents, servants, dealers, distributors, etc... from selling their product under the name of 'Tran Kera' and not to commit breach of plaintiff's trademark 'Tran Keri', till final disposal of the suit.

2. The plaintiff – respondent had approached the District Court, Mehsana with the said suit for infringement of Trade Mark and passing off action, alleging that the plaintiff is a registered trademark owner in the name of Tran Keri brand since 1961, and has got the said trademark registered for Class-III products, for different products of same category. The case of the plaintiff further is that in recent past of filing of the suit, the defendants have introduced their products of same category, under brand name of 'Tran Kera' and has thereby engaged itself in the act of passing off and infringement of copyright of trademark of the plaintiff and therefore, the suit for injunction.

3. Before the trial Court, the case of the defendant – appellant was that the plaintiff is not the registered owner of trademark of the products in question viz. a soap cake with single cake packing and soap cakes with five cake packing of Super Delux quality, as the

trademark has not been renewed after his initial registration. The case of the defendant further is that the product of the defendant is not sought to be passed off as product of the plaintiff by adopting a similar design, because in the product of cakes with five cake packing of the plaintiff, there is a pictorial logo of three mangoes, whereas in the similar packing of the defendant, there is no such logo, likewise the fonts used in the design of the packing, are also different viz. the plaintiff's product is described as 'Tran Keri' (meaning three mangoes), whereas the defendant's product is indicated as 'Tran Kera'. The difference therefore, can be identified by any layman starting from a child to an illiterate rustic villager, and as such, there is no similarity in the packing of the two products.

3.1The trial Court came to a conclusion that there was similarity in the packing and therefore, there was prima-facie infringement of the plaintiff's trademark and copyright and therefore, passed the impugned order.

4.Learned Advocate Mr.Patel for the appellant – original defendant submitted that the Court below has committed

an error in overlooking the fact that the plaintiff is not a registered owner of the trademark. He, in all fairness, also indicated that the defendant is also not a registered owner of the trademark. But, submitted that the defendant has applied for registration of its trademark in recent past.

4.1Mr.Patel submitted that if the two products are similar, except the colour, there is no similarity and colour is a scheme, which is generally adopted by manufacturers of similar products, and therefore, the trial Court committed an error in holding that the products are sought to be marketed under similar trademarks.

4.2 Mr.Patel submitted that the Court below has not taken into consideration the fact that in the five cake packing of the defendant, there is absence of the logo depicting three mangoes. In fact, there is no logo at all in the packing of the defendant. The fonts are also not similar as they will have different meaning. Tran Keri would mean three mangoes. Learned Advocate however, was not able to give exact meaning of word 'Kera'. Authentic Gujarati Encyclopedia

"Bhagvadromandal" was referred to by this Court to know the meaning.

5.Learned Advocate Mr.Patel relied on the decisions in case of ***M/s. National Chemicals and Colour Co. and others Ors. Vs. Reckitt and Colman of India Limited and another; reported in A.I.R. 1991 Bombay 76***, in the case of **Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., reported in 2001 S.C. 1952** and in the case of **Dahriwal Industries Ltd & Anr. Vs. M/s. S.S. Food Products, reported in A.I.R. 2005 S.C. WEEKLY 1214** and submitted that in light of the law laid down in these pronouncements, the Court has to examine as to who is the prior user of the trademark, where the parties are not registered trademark owners. The Court has to examine whether any goodwill is created or not and whether any loss is likely to occur to the parties. Mr.Patel submitted that the Court below has not considered the case of the parties in proper perspective and therefore, the appeal may be admitted and the operation, implementation and execution of the order, may be stayed till final disposal of the appeal.

6.Learned Advocate Mr.Jatin Trivedi appearing for the

respondent – original plaintiff on caveat has opposed this appeal. According to him, the plea of prior user has never been taken by the defendant before the trial Court.

6.1 He submitted that he does not dispute the fact that neither of the parties are owners of a registered trademark for the product in question. But, he submitted that the defendant has applied for registration of trademark only after a notice was served by the plaintiff. He submitted that while considering the question whether the act of passing off is relating to similar trademarks which need not be identical, a comparison has to be made from the viewpoint of a layman and not of an expert or a keen observer. He relied on the following judgments to support his case.

1. **Ambati Narasayya Vs. M.Subba Rao & Another reported in A.I.R. 1990 KERALA 119.**

2. **Duncans Agro Industries Ltd. Vs. Somabhai Tea Processors (P) Ltd., reported in 1995 (1) G.L.R. 380.**

3.Parle Products (P) Ltd. Vs. J.P. & Co., Mysore reported in A.I.R. 1972 S.C. 1359.

4.National Sewing Thread Company Limited Vs. James Chadwick & Bros. Ltd., reported in A.I.R. 1953 S.C. 357.

6.2Mr.Trivedi submitted that the trademark used by the defendant viz. Tran Kera has no meaning and the defendant has not been able to explain as to why this trademark is sought to be used. The registration certificate are placed on record of the Court, only to show that trademark Tran Keri was conceived by the plaintiff long back and has been consistently used for various products and as such the present products in question are also being marketed by the plaintiff, prior in point of time, as compared to the defendant. The defendant has recently entered the market and action of the defendant is affecting the goodwill of the plaintiff, its product, as can be seen from various documentary evidence produced by the plaintiff before the trial Court.

6.3 Mr.Trivedi indicated that the defendant has produced one or two affidavits in an attempt to demolish only a

part of the evidence of the plaintiff. But, similar evidence flowing from other sources has remained uncontroverted. It is also contended that it would be a matter of evidence, as to case of which of the party, can be accepted in respect of such controversial evidence, and at this stage, the Court may not enter into such inquiry but, may rely on prima-facie material produced by parties, which view of the High Court was approved by the Supreme Court, in the case of Dahriwal(supra). Mr.Trivedi therefore, submitted that this Court may not entertain the appeal and may not interfere with the injunction granted by the Court below.

7. This Court has taken into consideration rival side contentions.

8. There is no dispute about the fact that both the parties are engaged in similar business of manufacturing and marketing soap products. The dispute of trademark is in respect of one product. viz. Cake Soap. Cake soap marketed in a single cake packing and a five cake packing. Both the sides are marketing these products under their respective trade names viz.

'Tran Keri' by the plaintiff and 'Tran Kera' by the defendant. It is also not in dispute that the products are being marketed in the same zone viz. North Gujarat.

9. The trademark used by the plaintiff, 'Tran Keri' has a meaning. It means three mangoes. The product is wrapped in a packing of green colour, as far as, it relates to five cake packing, the packing has a logo depicting three mangoes.

9.1 So far as the defendant's product is concerned, it is also packed in a green colour wrapper but, there is absence of a logo.

9.2 So far as product marketed in a single cake packing is concerned, both the sides are using blue background on the wrapper and both the packings have logos on the right hand top corner. The plaintiff's logo depicts three mangoes, whereas, defendant's logo depicts three fruits, which are very similar to mangoes, though the size of the logo is relatively small.

10. Learned Advocate Mr.Patel was right when he said that mango is a well-known fruit and no person can

ordinarily commit a mistake in recognizing a mango or a product relating to three mango viz. the plaintiff's product. Mr.Patel, was however, at loss to explain as to what is the meaning of word 'Kera' used in the trademark of the defendant. He submitted that it is a small fruit incomparable to mango. But, he was not able to explain as to what is the real meaning. Authentic Encyclopedia “Bhagvadromandal” was therefore, examined for that purpose, and it is found that Kera, as is used in the trademark of the defendant(with a dot on the last letter) would mean a tree of the fruits, known in Gujarat as “Kerada” and 'Kera' without a dot on the last letter would mean a Banana. Therefore, it appears that 'Kera' has no nexus with any fruit, as is depicted in the logo, used in a single cake packing by the defendant. There is no explanation whatsoever coming forward as to how the logo can be connected with the trademark emerging from the fonts used in the trademark used by the defendant because, 'Kera' would mean a tree of fruit. 'Kera' without a dot on the last letter would mean a Banana and has no similarity whatsoever with the logo used with the trademark used by the defendant. The logo of the defendant, on the contrary though of a smaller size, has very similar

shape to that of mangoes.

11.This Court has also inspected the packings of the two products of both the parties.

12.The case of the learned Advocate for the appellant that the colour scheme is commonly used by various manufacturers of similar products does not seem to be so very accurate because, from the various products shown by him to this Court, itself, it is clear that different colour schemes are used on wrappers of soap cakes. Even, in the two trademarks in question, the colour scheme is different in two packing variants viz. one in the green and other in blue. Learned Advocate for the appellant relied on yet another trademark packing of the plaintiff under name of mangoes which has brown colour scheme. There are other products which has yellow colour scheme also. Therefore, the contention that green colour scheme is generally used by manufacturers and therefore, it cannot be considered as an act of passing off, cannot be accepted.

13.It is established proposition of law that while examining such cases, similarity has to be examined not from the viewpoint of an expert or a person with sharp

sense of observation. It is also to be borne in mind that both the products may not be available for comparison at all places therefore lying side by side. The consumer would be required to rely on his observation and memory. Resultantly, if generally the marks are found to be similar, the possibility of the consumer confusing himself between the products cannot be ruled out, which would ultimately, result into a passing off. This Court has, as stated earlier, examined the two trademarks and is in agreement with the observations of the Court below that they are very similar to each other. When somebody speaks 'Tran Keri' or 'Tran Kera' even phonetically, difference is marginal. The colour scheme is also very similar in respect of both the products. Mere absence of a logo would not remove the trademark from the arena of similarity. Logo is only a part of the scheme of the Trade Mark, as one of the features. A common man may not even remember whether there exists a logo or not or if it does whether it is the same logo. The end consumer of the product are housewives of relatively economically weaker section. The education standard of such consumer is also to be borne in mind. Therefore, in the opinion of this Court, both the trademarks,

prima-facie appear to be very similar.

14. Now comes the question as to who is the prior user of the trademark. Undisputedly, the defendant has recently entered the market, as indicated; about three months, whereas the plaintiff is in market for large number of years and is marketing various products under brand name of 'Tran Keri'. May be these two particular products have been introduced in the market more recently, but, it is clear from the record that the product of plaintiff / respondent is definitely prior to the defendant entering in the market. There are various communications produced by the plaintiff on record of the Court below to indicate that the defendant's product has been launched subsequent to the introduction of the plaintiff's product. It is true that two of such communications are sought to be indicated as procured ones. But, that would be a matter of evidence, as to who is right. But, prima-facie, there remain on record, other communications flowing from various retailers of the product of the plaintiff.

15. Thus, prima-facie this Court is satisfied that the plaintiff is the user of the trademark prior in point of time. The sales figures indicate that the plaintiff

has secured a reasonably large market, obviously a goodwill must have been created therefrom. This view is reflected in various communications from the retail traders.

16.The last point that requires consideration would be, whether the action of the defendant is likely to cause any loss to the plaintiff. This Court having observed that the trademarks are similar, that the plaintiff is prior user of the trademark, that plaintiff has generated goodwill, obviously, the defendant's use of the similar trademark, would result into damage to the plaintiff's business and trademark. Therefore, in the opinion of this Court, no error can be said to have been committed by the Court below, while granting injunction. The appeal therefore, must fail and stands dismissed.

17.In view of the order passed in Appeal from Order, Civil Application No.8215 of 2005 would not survive and is accordingly disposed of.

(A.L.DAVE, J.)

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